Supreme Court, U.S.
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85-591

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC.,

Petitioner,

—v.—

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Section 6213(a) of the Internal Revenue Code provides, in relevant part, that no assessment of a deficiency in respect of the tax in issue and no levy or proceeding in court for its collection shall be made, begun or prosecuted until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of 90 days after such mailing, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. It further provides: ". . . [T]he making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

The question presented is whether the court of appeals has failed to follow this Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), and this Court's implicit holding in *Laing v. United States*, 423 U.S. 161 (1976), by holding that the Taxpayer's appeal from dismissal of its action for an injunction became moot when the Taxpayer had a check of $137,763.31 delivered to the Internal Revenue Service under threat of having its assets seized by the Internal Revenue Service to satisfy the balance of an assessment that was made without first issuing a notice of deficiency.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W.C. Garcia & Associates, Inc. petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., A) is not reported. The order of the District Court (App., B) is not reported.

JURISDICTION

The order of the court of appeals (App., A) was entered on February 11, 1985. A timely petition for rehearing was denied on July 11, 1985 (App., C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6211, 6212, 6213, 6851, 6861, 6863, 7421, and 7430 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in App., F, *infra*, 8a-14a.

STATEMENT

Summary

This case was instituted by the Taxpayer in the district court to obtain an injunction in accordance with Section 6213(a), Internal Revenue Code of 1954[1], preventing the Government from collecting an income tax deficiency that was assessed without first issuing a statutory notice of deficiency. During the district court proceedings the Government refrained from collection action and an appropriate guarantee was made to the Government if the Taxpayer did not pay. While the Taxpayer was preparing its appeal to the court of appeals after being unsuccessful in the district court and with the guarantee still in existence, the Government threatened to seize the Taxpayer's assets if it did not immediately receive a check for $137,763.31 which the Government said was the amount owed on the assessment in issue. The check of $137,763.31 was mailed to the Government under protest and, among other things, the Government was informed that the check was not intended as a payment of the assessment, and that the Government should return the check if it changed its mind about seizing the $137,763.31.

In the district court the parties were only concerned about the principles governing the granting of an injunction and there was no mootness issue. The Taxpayer argued that *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), which were relied upon by the Government, were contrary to this Court's

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1 All statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) in effect for the tax year in issue.

opinion in *Laing v. United States*, 423 U.S. 161 (1976), and that *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), was misapplied in *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d at 313. *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, stand for the principle that to obtain an injunction under Section 6213(a) a taxpayer must show irreparable harm and no adequate remedy at law. The Taxpayer argued that in *Laing v. United States*, *supra*, this Court, in granting an injunction under Section 6213(a), did not mention irreparable harm or no adequate remedy at law.

After the Taxpayer filed its appeal, the Government filed its motion to dismiss the appeal as moot on the ground that the tax had been paid. The court of appeals agreed and dismissed the case.

W. C. Garcia & Associates, Inc., a corporation, (the "Taxpayer"), brought this action by filing its complaint in the United States District Court for the Northern District of California against Michael D. Sassi, District Director, Internal Revenue Service, (the "Government") to enjoin collection of the personal holding company tax for the taxable year ended November 30, 1975, illegally assessed against the Taxpayer, for the return of all assets seized and held pursuant to the assessment, and for litigation costs. The district court had jurisdiction by reason of Section 6213(a).

In 1979 the Internal Revenue Service ("IRS") assessed against the Taxpayer a deficiency in personal holding company tax in the amount of $82,833.80 for the taxable year ended November 30, 1975 (App., E). That amount has since increased due to related interest and penalties being assessed. The IRS failed to mail to the Taxpayer the notice of deficiency required by Section 6212 (App., E). Accordingly, the assessment is prohibited, illegal and void, but the Taxpayer is not allowed to file a petition for redetermination of the deficiency in the United States Tax Court because the notice of deficiency was not issued. Section 6213(a).

The position of the Taxpayer set forth in the complaint is that Congress has deemed irreparable harm *per se* the making of the assessment and the denial of access to the United States Tax Court and has deemed inadequate *per se* the legal remedy of a suit for refund after payment of the tax. Assessments that violate the notice of deficiency requirements of Section 6213(a) may be enjoined if the effect would be to prevent the Taxpayer from using the United States Tax Court.

Following a hearing held on January 18, 1984, the district court (Judge Patel) entered an order on January 27, 1984, denying the Taxpayer's application for a temporary restraining order because it appeared that there were substantial questions about the probability of success on the merits and because the Taxpayer had not shown that it was unable to pay the tax and sue for refund (App., D). At the hearing on January 18, 1984 the Government received a guarantee on the record (Transcript p. 13) for the ultimate payment of the assessment. Thereafter, pursuant to Section 6213(a), the Taxpayer filed a motion for a preliminary injunction, based on the failure of the IRS to comply with Section 6212(a) in not issuing a notice of deficiency to the Taxpayer.

On March 12, 1984, the district court denied the motion for preliminary injunction on the authority of *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), stating that the law of the Ninth Circuit is that a taxpayer is not entitled to injunctive relief under Section 6213(a) absent a showing of irreparable harm and inadequate legal remedy (App., E). The district court rejected the claim of the Taxpayer that *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, conflict with *Laing v. United States*, 423 U.S. 161 (1976), and that its exclusion from the Tax Court was irreparable injury *per se* and that a suit for refund after payment of the tax was *per se* an inadequate legal remedy (App., E).

On March 12, 1984, the Government filed a motion for summary judgment upon substantially the same grounds upon

which it had opposed the Taxpayer's motion for preliminary injunction. On May 21, 1984, the district court entered its order and judgment granting the Government's motion for summary judgment and dismissing the Taxpayer's action and complaint with prejudice (App., B).

While the Taxpayer was preparing its appeal to the court of appeals, the Government threatened to seize assets of the Taxpayer if it did not receive $137,763.31. On May 30, 1984, a remittance of $137,763.31 was sent to the IRS. The remittance was accompanied by a letter from James F. Kennedy, an attorney for the Taxpayer, to the IRS for the attention of Revenue Officer Robert Yakerson. A copy of the letter is attached as Exhibit C to the Government's "Motion to Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance." It reads, in part, as follows:

> Dear Mr. Yakerson:
>
> Enclosed is a check in the amount of $137,763.31. It is submitted under protest and only submitted because you said to me on May 24, 1984 in our telephone conversation that if you did not receive this check you would seize assets of W.C. Garcia & Associates, Inc. because of an assessment that has been made as a result of alleged personal holding company tax liability for the fiscal year ended November 30, 1975. You told me that you did not care what restrictions were placed on sending this check.
>
> You told me the total of $137,763.31 has not even been assessed, yet you still demanded that amount and if you did not receive it you would seize the assets of the taxpayer in that amount. You also said you would not send a bill for the amount prior to payment. You read amounts over the telephone but you said you did not know what some of them represented.
>
> The assessment referred to is illegal. *Perlowin* v. *Sassi*, 711 F.2d 910 (9th Cir. 1983). Therefore the collection of any amounts against the assessment is clearly improper and is subject to recourse in the courts. I told you that we

> are going to file an appeal with the Ninth Circuit Court of Appeals, but you said you still demand receiving $137,763.31. This check is not intended in any way as an admission by the taxpayer that the assessment is proper, nor is it intended by the taxpayer to be a payment of the assessment. It is only intended to prevent you from seizing assets of the taxpayer which conduct would be illegal since your assessment is illegal and such conduct would cause serious injury to the taxpayer. The remittance is not a payment in satisfaction of a tax liability, but is a deposit in the nature of a cash bond.
>
> We preserve all rights to sue you personally and to sue the United States for damages for your illegal actions. See, *Bothke* v. *Fluor Engineers and Constructors Inc., et al.*, 713 F.2d 1405 (9th Cir. 1983). If you change your mind about seizing this $137,763.31, please return it to me and you will reduce the amount of the damages.

The Taxpayer filed its appeal with the court of appeals and the Government filed a Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance. The Government's mootness argument centered on the receipt of the check of $137,763.31 which was treated by the IRS as a payment, resulting in the balance of the assessment in issue being treated as paid.

The Taxpayer filed Objections To Appellee's [Government's] Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance and a Memorandum Brief Of The Appellant W.C. Garcia & Associates, Inc., In Opposition To Appellee's Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance. As to the mootness issue, the Taxpayer maintained that the remittance of $137,763.31 was not payment of the tax. The remittance was accompanied by the aforesaid letter from one of the Taxpayer's attorneys. The Taxpayer argued that the letter establishes that the position of the Taxpayer was that (1) the assessment was illegal and void; (2) the remittance was made

under protest in order to avoid an illegal seizure of the assets of the Taxpayer; (3) the remittance was not intended to be a payment of the illegal assessment made against the Taxpayer; and (4) the remittance was a mere deposit in the nature of a cash bond.

On February 11, 1985, the court of appeals entered an Order granting the Government's motion to dismiss the Taxpayer's appeal as moot without any hearing being held (App., A). The Order states in relevant part:

> . . . In the circumstances of this case, appellant's satisfaction of the assessed tax deficiency constituted payment of the taxes. *See Rosenman* v. *United States*, 323 U.S. 658 (1945); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980). The appeal from the dismissal of its action for an injunction against the collection of taxes is therefore moot.

On February 22, 1985, the Taxpayer filed a Petition For Rehearing—Suggestion For Rehearing En Banc.

On July 11, 1985, the court of appeals entered an Order denying the petition for rehearing and rejecting the suggestion for rehearing en banc (App., C).

The district court found that the IRS did not send the Taxpayer a notice of deficiency prior to the assessment as required by Section 6212(a) and (c) (App., E). Neither the district court nor the court of appeals found that the Taxpayer had waived any right to a notice of deficiency (App., A, B, D, and E).

REASONS FOR GRANTING THE PETITION

This case involves the construction of Section 6213(a), which provides that the assessment and collection of a deficiency in income tax may be enjoined if the notice of deficiency authorized by Section 6212(a) has not been mailed to the Taxpayer. The interpretation of Section 6213(a) by the district court, an interpretation which has thus far, escaped review, is in direct conflict with the interpretation of this section in *Laing v. United States*, *supra*, 423 U.S. 161 (1976).

The holding of the district court is based on the authority of *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, *supra*, 711 F.2d 910 (9th Cir. 1983). These two cases are in conflict with *Laing v. United States*, *supra*; *Steiner v. Nelson*, 259 F.2d 853 (7th Cir. 1958); *Philadelphia & Reading Corp. v. Beck*, 676 F.2d 1159 (7th Cir. 1982); *Campbell v. United States*, 532 F.2d 1057 (6th Cir. 1976); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976); *Maxwell v. Campbell*, 205 F.2d 461 (5th Cir. 1953); and *Peerless Woolen Mills v. Rose*, 28 F.2d 661 (5th Cir. 1928).

1. The court of appeals' holding that the Taxpayer's remittance constituted payment of the tax is in conflict with *Rosenman v. United States*, *supra*, 323 U.S. 658 (1945). The holding is also in conflict with *Fortugno v. Commissioner*, 353 F.2d 429 (3rd Cir. 1965), *aff'g* 41 T.C. 316 (1963); *Lewyt Corp. v. Commissioner*, 215 F.2d 518 (2nd Cir. 1954); and *Charles Leich & Co. v. United States*, 329 F.2d 649 (Ct. Cl. 1964).

The court of appeals held that in the circumstances of this case, the Taxpayer's satisfaction of the assessed tax deficiency constituted payment of the tax, citing *Rosenman v. United States*, *supra*; and *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980). It therefore held that the Taxpayer's appeal from dismissal of its action for an injunction against the collection of the taxes was moot (App., A). Unfortunately, the court of

appeals gave no explanation of its holding that the tax had been paid. The two cases cited by it both held that a remittance made prior to assessment did not constitute payment of the tax.

Neither the court of appeals nor the district court has found that there was a valid assessment prior to the remittance of $137,763.31 made on May 30, 1984 (App., A, B, D, and E).

Since the IRS failed to mail a notice of deficiency, the assessment in this case is invalid under Section 6213(a). *Perlowin v. Sassi*, *supra*, 711 F.2d at 912. It is also certain that the Taxpayer has not acquiesced in the proposed deficiency and that the remittance of May 30, 1984, was not made with the intention of satisfying an asserted tax liability.

The remittance of $137,763.31 on May 30, 1984, was accompanied by a letter from James F. Kennedy, an attorney for the Taxpayer, to the IRS (*supra*, p. 5). The check of $137,763.31 was issued subject to whatever restrictions the Taxpayer chose to put on it (first paragraph, last sentence). The Taxpayer stated, among other things, that the check was being seized by the Government and asked that it be returned (last sentence).

In this case, there was neither a valid assessment nor an acquiescence in the proposed deficiency. "[T]he factors of 'contest', coupled with the fact of no assessment, are sufficient to negate 'payment.' " *Charles Leich & Co. v. United States*, *supra*, 329 F.2d at 653 (Ct. Cl. 1964). Here the remittance was made under protest and the amount remitted was only for the purpose of avoiding an illegal seizure of other assets of the Taxpayer. *Cf. Rosenman v. United States*, *supra*. The remittance was being tendered with one hand and the liability for the tax being contested with the other. *Lewyt Corp. v. Commissioner*, *supra*, 215 F.2d at 522-523 (2nd Cir. 1954); *Fortugno v. Commissioner*, *supra*, 353 F.2d at 435-436 (3rd Cir. 1965).

Neither *Rosenman v. United States*, *supra*, 323 U.S. 658, nor *Ford v. United States*, *supra*, 618 F.2d 357 (5th Cir. 1980),

the only authority cited by the court of appeals (App., A), supports the court of appeals' holding that the remittance made by the Taxpayer on May 30, 1984, constituted payment of the tax. Indeed, the holding conflicts with *Rosenman v. United States*. In *Rosenman v. United States*, the petitioners, faced with an absolute deadline for the payment of estate taxes, delivered to the IRS a check for $120,000, " 'as a payment on account of the Federal Estate Tax. . . . This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.' " *Rosenman v. United States*, *supra*, 323 U.S. at 660. The Court rejected the assertion of the Government that the tax was "paid" when the executors delivered the money and, therefore, the claim for refund was time barred. 323 U.S. at 662. It held that when the executors remitted the money to the Government, "the taxpayer did not discharge what [was] deemed [to be] a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until [the deficiency was assessed]." *Id.*

On its facts, the instant case is indistinguishable from *Rosenman v. United States*. The letter which accompanied the remittance in this case states unequivocally that the remittance was not intended to discharge what the Taxpayer deemed to be a liability. As in *Rosenman v. United States*, the remittance was made under protest. In *Rosenman v. United States*, the remittance was made solely for the purpose of avoiding penalties and interest. In the instant case, the remittance was made in order to avoid an illegal seizure of other assets of the Taxpayer. In *Rosenman v. United States*, the executors maintained that not all of the amount of the remittance was legally due. In the instant case, the Taxpayer maintained that none of the remittance was legally due. *Rosenman v. United States* held that the remittance did not become a payment prior to assessment of

the tax. In the instant case there has been no valid assessment of the tax.[2]

The published position of the Government accords with that of the courts that a deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest. Revenue Procedure 82-51, 82-2 C.B. 839 (1982).

The remittance made on May 30, 1984, was not a payment of the void and illegal assessment, but was a mere deposit in the nature of a cash bond. The court of appeals' holding that the remittance made on May 30, 1984, constitutes payment of the tax, is in conflict with *Rosenman v. United States*, *supra*, at 662; *Charles Leich and Co. v. United States*, *supra*; and *Fortugno v. Commissioner*, *supra*.[3] The holding is also in conflict with *United States v. Consolidated Edison Company of New York, Inc.*, 366 U.S. 380 (1961), holding a remittance of real estate taxes under protest and while contesting them did not result in a deduction for an accrual basis taxpayer. The Court held that the remittance, which did not admit, but specifically denied, liability for, and was not intended to satisfy, the contested assessments of real estate taxes was a

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2 *Koger v. United States*, 755 F.2d 1094 (4th Cir. 1985), concerns an injunction action becoming moot because the assessment was "paid" while the appeal was pending. 755 F.2d at 1096. Since the assessment was not paid in the instant case, *Koger v. United States* has no weight as to the mootness issue in this case.

3 The Court in *Laing v. United States*, *supra*, 423 U.S. at 183-184, n. 26, acknowledged without deciding that due process under the Fifth Amendment may also be violated where a taxpayer is denied access to a judicial determination of the validity of a tax prior to payment. See also, *Rambo v. United States*, *supra*, 492 F.2d at 1064-1065, for similar concern, but without deciding the issue.

This Court did not decide the due process issue in *Laing v. United States*, *supra*, because the case was decided on the application of Section 6213(a) in requiring an injunction. Likewise, we believe this case should be resolved under *Laing v. United States*, *supra*, and *Rosenman v. United States*, *supra*, without having to resolve the due process issue.

mere deposit in the nature of a cash bond, made to prevent seizure of the taxpayer's property during the contest and was not a payment of the taxes.

Even if the injunction issue were moot, that would not mean the entire case would be moot. See, *Murphy v. Hunt*, 455 U.S. 478 (1982); *United States v. Geophysical Corp.*, 732 F.2d 693 (9th Cir. 1984). The Taxpayer, in its complaint in the instant case, alleged that the assessment was illegal and prayed that an injunction be issued, that the Government be ordered to return all assets seized pursuant to the assessment, and that litigation costs be awarded to it pursuant to Section 7430. There has been no ruling on whether the assessment is illegal, on whether the assets that were seized should be returned and, on whether litigation costs should be awarded. If the assets are ordered returned, then litigation costs may properly be awarded. See Section 7430.

The court of appeals still should determine if the assessment is illegal and, if so, whether the return of all assets seized and held pursuant to the assessment should be returned to the Taxpayer. See, *Steiner v. Nelson*, *supra*, 259 F.2d at 858 (7th Cir. 1958). In addition, the court of appeals should then rule on whether the Taxpayer is entitled to litigation costs both of which are sought in the prayer of the complaint.

In *Murphy v. Hunt*, *supra*, 455 U.S. at 481-482 this Court found the claim to be moot once Mr. Hunt was convicted, and went on to state:

> ". . . The question was no longer live because even a favorable decision on it would not have entitled Hunt to bail. For the same reason, Hunt no longer had a legally cognizable interest in the result in this case. He had not prayed for damages nor had he sought to represent a class of pretrial detainees."

In the instant case, the court of appeals has not fully ruled on the relief sought in the prayer. At least part of the case remains alive.

2. The holding of the court of appeals also conflicts with the implicit holding in *Laing v. United States*, *supra*, 423 U.S. 161 (1976), that the tax therein had not been paid and the case had not become moot. In *Laing v. United States*, which is indistinguishable from the instant case, this Court held that the failure of the Internal Revenue Service to issue notices of deficiency in income tax and the consequent unavailability of a remedy in the Tax Court entitled the taxpayers to injunctive relief against assessments of income tax made in violation of that section, without any showing by the taxpayers of irreparable injury or inadequacy of legal remedy other than the inability of the taxpayers to contest the deficiencies in the Tax Court.

Laing v. United States, involved two unrelated taxpayers, Mr. Laing and Mrs. Hall, whose taxable years were terminated prior to their normal expiration date pursuant to the jeopardy termination provisions of Section 6851. The issue was whether the IRS, when assessing and collecting the unreported tax due after the termination of a taxpayer's taxable period, must follow the procedures mandated by Section 6861 *et seq.* for the assessment and collection of a deficiency whose collection is in jeopardy. The answer depended on whether the unreported tax due upon such a termination is a "deficiency" as defined in Section 6211(a) (423 U.S. at 163 and 164). The Government did not seriously challenge the taxpayers' conclusion that if the termination of their taxable periods created a deficiency whose assessment or collection was in jeopardy, the assessments and collections in the cases should have been pursuant to the procedures of Section 6861 *et seq.* (423 U.S. at 173). It was held that any tax owing, but unreported, after a Section 6851 termination is a deficiency whose assessment and collection are subject to the procedures of Section 6861 *et seq.*; that Section 6861(b) requires that a notice of deficiency under Section 6212 be mailed to the taxpayer within 60 days after the jeopardy assessment; that Section 6863 bars the offering for sale of property seized until the taxpayer has had an opportunity to litigate in the Tax Court; and that because the District Director failed to follow the procedures mandated by Section 6861 *et*

seq., the Section 6213(a) exception to the Anti-Injunction Act, Section 7421(a), became operative and the taxpayers' suits to enjoin collection of the taxes were not barred by the Anti-Injunction Act (423 U.S. at 184-186, n. 27).

In *Laing v. United States*, the IRS had seized more than $300,000 of Mr. Laing's money and applied a portion of it to the termination assessment of income tax in the amount of $195,985.55 made against him pursuant to the provisions of Section 6851. (423 U.S. at 165-166). The termination assessment was illegal and void since the IRS had failed to mail a notice of deficiency to Mr. Laing. *Perlowin v. Sassi*, *supra*, 711 F.2d at 912. Mr. Laing had not acquiesced in the proposed deficiency, but was contesting it, both in the action brought by him for an injunction against collection of the deficiency and in a suit for refund of the tax. (421 U.S. at 165-166, n. 6). Although the facts in *Laing v. United States*, with respect to whether the tax had been paid are basically the same as those herein, in *Laing v. United States*, the Government made no claim that the tax had been paid and the case had thus become moot. Since there was neither a valid assessment nor an acquiescence in the proposed deficiency, IRS' seizure of Mr. Laing's money and application of some of it to the termination assessment did not result in payment of Mr. Laing's tax (*Rosenman v. United States*, *supra*, 323 U.S. 658) and his case had not become moot. The holding of the court of appeals herein that the tax has been paid and the case has thus become moot conflicts, therefore, with the opposite holding implicit in *Laing v. United States*.[4]

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4 In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court addressed a question of mootness before reaching the merits of the claim. In holding that the controversy was alive, the Court stated, "This problem was present in *Dunn v. Blumstein*, 405 U.S. 330 (1972), and was there implicitly resolved in favor of the representative of the class. . . ." 419 U.S. at 400. The Court then said: "The rationale of *Dunn* controls the present case. . . ." 419 U.S. at 401. In *Pennhurst State School & Hospital v. Halderman*, ___ U.S. ___, 104 S.Ct. 900, at 918 (1984) the implicit holdings in cases on jurisdictional issues were held not to be binding on the Court. There is no jurisdictional issue in this case.

3. The holding of the district court, that the Taxpayer is not entitled to injunctive relief under Section 6213(a) absent a showing of irreparable harm and the absence of an adequate legal remedy, a holding which conflicts with *Laing v. United States*, *supra*, 423 U.S. 161 (1976), has evaded review. Review has thus far been evaded because of the remittance made under threat of seizure of the Taxpayer's assets unless the Taxpayer mailed a check for the void and illegal assessment in this case.

We do not know the number of times the Government has employed these tactics in an attempt to deny taxpayers access to the Tax Court, or to deny taxpayers a hearing on their right to an injunction under Section 6213(a) against collection of an illegal and void assessment of income tax made without prior issuance of a notice of deficiency.[5] If the order of the court of appeals dismissing the appeal in this case as moot is allowed to stand, one may expect that, at least in the Ninth Circuit, the Government will use this newly discovered device to prevent a hearing in an injunction action by merely demanding "payment" of the illegally assessed tax prior to the hearing, thus attempting to make the injunction issue moot. Since the record is silent on the point, the Government has left us to speculate why a check of $137,763.31 was demanded in May 1984 while the appeal to the court of appeals was being prepared, even though the illegal assessment was made in 1979 and even though the ultimate payment of the assessment was guaranteed.

It is reasonable to expect that, as was done in this case, the Government may continue to make assessments of income tax without having issued notices of deficiency and may continue to threaten to seize assets of taxpayers unless the taxpayers pay the illegal assessments. Taxpayers who can pay under such

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5 The latest reported decision evidencing a continuation of such tactics by the Government is *Koger v. United States*, *supra*, n.2, 755 F.2d 1094 (4th Cir. 1985). We have no way of knowing whether there are other unreported cases, such as the instant case, that also show the Government's attempt to deny injunction hearings on assessments by use of this mootness argument.

threats will be denied an injunction hearing in the Ninth Circuit because the question would become moot before the hearing could be finalized. This would then prevent taxpayers from attempting to convince the court of appeals to overrule itself in *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, as to its error in applying the principles established by this Court for granting an injunction under Section 6213(a). Such tactic would also prevent taxpayers from petitioning this Court to reverse the court of appeals in the *Cool Fuel, Inc. v. Connett* and *Perlowin v. Sassi* type cases.

By granting certiorari in this case and reversing the court of appeals on the mootness issue, this Taxpayer will be enabled to maintain before the court of appeals that *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, are contrary to a prior decision of this Court, *Laing v. United States*, *supra*, and misapply a prior decision of this court, *Weinberger v. Romero-Barcelo*, *supra*, concerning the correct rule of law to follow in applying equitable principles in Section 6213(a) injunction cases. Should the court of appeals not overrule its own two decisions, the Taxpayer could then seek review by this Court on the injunction issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2234

DC # CV-84-0224 MHP
Northern California

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff-Appellant,

—VS.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant-Appellee.

ORDER

Filed: February 11, 1985

Before:
SCHROEDER, FARRIS and REINHARDT, *Circuit Judges.*

Appellee's motion to dismiss this appeal as moot is granted. In the circumstances of this case, appellant's satisfaction of the assessed tax deficiency constituted payment of the taxes. *See Rosenman v. United States*, 323 U.S. 658 (1945); *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980). The appeal from the dismissal of its action for an injunction against the collection of taxes is therefore moot.

The appeal is dismissed and the case remanded to the district court with direction to vacate the orders and judgment from which the appeal was taken. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—v.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER

Filed: May 21, 1984

This matter having come on for hearing on defendant's motion for summary judgment and the Court having considered the memoranda and the record to date, and for good cause shown, it is hereby

ORDERED that defendant's motion is hereby GRANTED and plaintiff's complaint and action are hereby dismissed. Judgment shall be entered accordingly.

ORDERED this day of MAY 21 1984, at San Francisco, California.

/s/ M H PATEL
United States District Judge

ORDER

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2234

D.C. #CV-84-0224-MHP
(Northern California)

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff-Appellant,

—vs.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant-Appellee.

ORDER

Filed: July 11, 1985

Before:
SCHROEDER, FARRIS and REINHARDT, *Circuit Judges.*

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—v.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER

Filed: January 27, 1984

This matter came on for hearing on plaintiff's motion for a temporary restraining order to enjoin the Internal Revenue Service from collecting a tax assessment made against plaintiff. Based on the pleadings filed by plaintiff and arguments of counsel, the Court finds that there is no immediacy that requires it to act prior to having the matter set for a motion for preliminary injunction. The Court is not satisfied that the plaintiff could prevail on the merits because it appears there is substantial questions about the waiver and the probability of success on the merits. In addition, the plaintiff has not shown that it is unable to pay the tax and sue for a refund in district court. Accordingly, the Motion for Temporary Restraining Order is therefore denied.

ORDERED this day of JAN 27 1984, at San Francisco, California.

/s/ M H PATEL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—VS.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER DENYING PRELIMINARY INJUNCTION

Filed: March 12, 1984

Plaintiff has filed a motion for preliminary injunction seeking to enjoin the Internal Revenue Service ("Service") from collecting an income tax deficiency assessed against it. The court reviewed the papers filed in support of and in opposition to the motion and heard oral argument, and having considered all the foregoing makes the following order.

The Service assessed an income tax deficiency in the amount of $82,883.80 in plaintiff's income taxes for the taxable year ended November 30, 1975. The Service did not send plaintiff a notice of deficiency prior to the assessment as required by 26 U.S.C. §§ 6212(a) and (c). The Service contends that by plaintiff's execution of a Waiver of Restriction on Assessment and Collection of Deficiency in Tax, plaintiff waived any right to a deficiency notice. Plaintiff has moved to restrain the assessment and collection of the deficiencies, pursuant to 26 U.S.C. § 6213(a), based on the failure of the Service to comply

with the requirements of 26 U.S.C. §§ 6212(a) and (c). Section 6213(a) provides that any assessment or collection may be enjoined until a notice of deficiency has been issued to the taxpayer.

Plaintiff contends that pursuant to § 6213(a), it is entitled to an injunction without a showing that it has suffered an irreparable injury or that the payment of the deficiency and subsequent suit for refund constitutes an inadequate remedy at law. According to plaintiff, under the plain language of the statute, plaintiff is entitled to an injunction upon proof that the deficiency assessment was made or collection attempted prior to the issuance of a notice of deficiency by the Service.

The law of this circuit, however, is to the contrary. In *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), this circuit held that a taxpayer is not entitled to injunctive relief under § 6213(a) absent a showing of irreparable harm and the absence of an adequate legal remedy. *Cool Fuel*, 685 F.2d at 313-14; *Perlowin*, 711 F.2d at 912. Plaintiff has alleged that its exclusion from the Tax Court is *per se* an irreparable injury. No Ninth Circuit authority supports such a contention. Nor has plaintiff shown payment of the deficiencies under protest, and subsequent suit for a refund to be an inadequate remedy of law.

Plaintiff has attempted to persuade this court that the Ninth Circuit cases of *Cool Fuel* and *Perlowin* conflict with the position of the Supreme Court in *Laing v. United States*, 423 U.S. 161 (1976). Plaintiff's argument is specious. The issue, of whether a taxpayer is entitled to injunctive relief pursuant to § 6213(a) to restrain any assessment or collection of a deficiency prior to the issuance of a notice of deficiency, was not before the Court in *Laing*. *Laing* does not discuss the equitable considerations for injunctive relief. Its silence does not justify plaintiff's reading that ordinary equitable considerations do not obtain under § 6213(a). In its 1983 decision in *Perlowin*, the Ninth Circuit considered *Laing* in another context. However, it did not see fit to read *Laing* in the manner urged by

plaintiff. Rather, it went on to reaffirm its holding in *Cool Fuel* that the taxpayer must show irreparable injury and lack of an adequate remedy at law.

Accordingly, plaintiff's motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: MAR 12 1984

/s/ M H PATEL

Marilyn Hall Patel
United States District Judge

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C.)

SEC. 6211. Definition of a Deficiency.

(a) In General.—For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, 44, and 45, the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45, exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * *

SEC. 6212. Notice of Deficiency.

(a) In General.—If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(c) Further Deficiency Letters Restricted.—

(1) General rule.—If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional

deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, or of chapter 45 tax for the same taxable periods, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

* * * *

SEC. 6213. Restrictions Applicable To Deficiencies; Petition To Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy

during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

(d) Waiver of Restrictions.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

* * * *

SEC. 6851. Termination Assessments of Income Tax.

(a) Authority for Making.—

(1) In general.—If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of the tax so determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current taxable year or such preceding taxable year, or both, as the case may be, and shall cause notice of such determination and assessment to be given the taxpayer, together with a demand for immediate payment of such tax.

* * * *

(b) Notice of Deficiency.—If an assessment of tax is made under the authority of subsection (a), the Secretary shall mail a notice under section 6212(a) for the taxpayer's full taxable year (determined without regard to any action taken under subsection (a)) with respect to which such assessment was made within 60 days after the later of (i) the due date of the taxpayer's return for such taxable year (determined with regard to any extensions), or (ii) the date such taxpayer files such return. Such deficiency may be in an amount greater or less than the amount assessed under subsection (a).

* * * *

SEC. 6861. Jeopardy Assessments of Income, Estate, Gift, and Certain Excise Taxes.

(a) Authority for Making.—If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * *

SEC. 6863. Stay of Collection of Jeopardy Assessments.

(a) Bond to Stay Collection.—When an assessment has been made under section 6851, 6861, or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary, within such time as may be fixed by regulations prescribed by the Secretary, a bond in an amount equal to the amount as to which the stay is desired, condi-

tioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of such assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of such assessment is abated, the bond, shall, at the request of the taxpayer, be proportionately reduced.

* * * *

SEC. 7421. Prohibition Of Suits To Restrain Assessment Or Collection.

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

SEC. 7430. Awarding Of Court Costs and Certain Fees.

(a) In General.—In the case of any civil proceeding which is—

(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and

(2) brought in a court of the United States (including the Tax Court and the United States Claims Court),

the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such proceeding.

* * * *

(b) Limitations.—

* * * *

(2) Requirement that administrative remedies be exhausted.—A judgment for reasonable litigation costs shall not be awarded under subsection (a) unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

(3) Only costs allocable to this United States.—An award under subsection (a) shall be made only for reasonable litigation costs which are allocable to the United States and not to any other party to the action or proceeding.

(4) Exclusion of declaratory judgment proceedings.—

(A) In general.—No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.

(B) Exception for section 501(C)(3) determination revocation proceedings.—Subparagraph (A) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

* * * *

(c) Definitions.—For purposes of this section—

* * * *

(2) Prevailing party.—

(A) In general.—The term "prevailing party" means any party to any proceeding described in subsection (a) (other than the United States or any creditor of the taxpayer involved) which—

(i) establishes that the position of the United States in the civil proceeding was unreasonable, and

(ii)(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented.

(B) Determination as to prevailing party.—Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made—

(i) by the court, or

(ii) by agreement of the parties.

* * * *

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-591

In the Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC., PETITIONER

v.

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this action for an injunction against collection of federal taxes, the court of appeals correctly dismissed petitioner's appeal as moot where petitioner neglected to obtain a stay pending appeal, but instead paid, at the conclusion of the district court proceedings, the entire amount of the taxes due.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a, 3a) and of the district court (Pet. App. 2a, 4a-7a) are unreported.

JURISDICTION

The order of the court of appeals dismissing the appeal as moot (Pet. App. 1a) was entered on February 11, 1985. A timely petition for rehearing was denied on July 11, 1985 (Pet. App. 3a). The petition for a writ of certiorari was filed on October 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a California corporation. During an audit of its 1975 corporate income tax return, petitioner agreed that it was a "personal holding company" within the

meaning of Section 541 of the Internal Revenue Code.[1] On March 8, 1978, petitioner's president signed IRS Form 2198, "Determination of Liability of Personal Holding Company (PHC) Tax." In signing that Form, petitioner agreed that its PHC tax liability for 1975 was $82,833.80 (CR 11, Exh. A; CR 21, Exhs. C & D).[2]

On the same day, petitioner's president signed IRS Form 870-C, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax." In signing that Form, petitioner consented to the immediate assessment of the above-mentioned taxes and explicitly waived the right to contest its liability therefor in the Tax Court.[3] Petitioner's consent to assessment as thus expressed was to take effect 120 days after the IRS approved petitioner's Form 2198, which, as noted above, concerned the amount of its 1975 PHC tax liability. The IRS approved petitioner's Form 2198 one week later, on March 15, 1985 (CR 11, Exh. A; CR 21, Exhs. C & D).

It was understood and agreed by the parties that petitioner was entitled to pay a so-called "deficiency dividend" under Section 547 of the Code—in essence, to "purge" itself of the income that caused it to be a personal holding company—and thus to eliminate (retroactively as it were) its liability for PHC tax. The statute requires that such a

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended and in effect for the period in issue (the Code or I.R.C.).

[2]"CR" refers to the docket control number assigned to the documents in the original record by the clerk of the district court.

[3]The Form 870-C signed by petitioner's president stated as follows (CR 11, Exh. A):

> I understand that by my signing this waiver, the corporation will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

deficiency dividend be paid "within 90 days after the determination" of the taxpayer's PHC tax liability (I.R.C. § 547(d)(1)). The statute further requires that the taxpayer file a "Claim for a Deficiency Distribution Deduction," on IRS Form 969, "within 120 days after the determination" of said liability (I.R.C. § 547(e)). Since the "determination" of petitioner's 1975 PHC tax liability was effected by the IRS's acceptance of petitioner's Form 2198 on March 15, 1978, petitioner was required by the statute to file its claim on Form 969 by July 13, 1978.

Although petitioner eventually paid a deficiency dividend to its shareholders, it failed to file a claim on Form 969 within the 120-day period that the statute prescribes. On July 13, 1978, therefore, petitioner's consent to the assessment of its 1975 PHC taxes became effective. The IRS assessed those taxes in due course, based on the waiver of restrictions on assessment and collection previously signed by petitioner's president. Petitioner thereafter submitted an untimely claim on Form 969, which was denied by the IRS as unauthorized by the statute (CR 21).

2. Petitioner then brought this suit against respondent Sassi, the IRS District Director, in the United States District Court for the Northern District of California, seeking to enjoin collection of the tax. Petitioner alleged that the assessment of PHC taxes was invalid because the IRS had failed to send it a "notice of deficiency" as required by Sections 6212 and 6213 of the Code. Section 6213(a) sets forth a "restriction on assessment" of taxes, providing generally that the IRS may not assess or collect a tax without first sending the taxpayer a notice of deficiency under Section 6212. Section 6213(d), however, provides that "[t]he taxpayer shall at any time * * * have the right, by a signed notice in writing * * *, to waive the restrictions provided in [Section 6213](a) on the assessment and collection" of the

tax. The IRS responded to petitioner's allegations by pointing out that, on March 8, 1978, petitioner's president had signed IRS Form 870-C waiving the Section 6213(a) restrictions and consenting to assessment of its 1975 PHC tax deficiency, so that a "notice of deficiency" was not required.

Following a hearing, the district court denied petitioner's application for a temporary restraining order, finding that there existed substantial questions about the probability of petitioner's success on the merits and that petitioner had not shown inability to pay the tax and sue for a refund (Pet. App. 4a). Following a second hearing, the court denied petitioner's motion for a preliminary injunction (*id.* at 5a-7a). It rejected petitioner's argument that it was entitled to injunctive relief merely by alleging an improper assessment, holding that petitioner also had to show irreparable harm and the absence of an adequate remedy at law, which petitioner had not done. See *Cool Fuel, Inc.* v. *Connett,* 685 F.2d 309, 313 (9th Cir. 1982); *Perlowin* v. *Sassi,* 711 F.2d 910, 912 (9th Cir. 1983); *Philadelphia & Reading Corp.* v. *Beck,* 676 F.2d 1159, 1163 (7th Cir. 1982). The district court thereafter granted the government's motion for summary judgment, which was based on petitioner's failure to show irreparable injury and lack of an adequate legal remedy, and dismissed the complaint with prejudice (Pet. App. 2a). Petitioner neglected to obtain a stay of the trial court's orders, but instead, on May 30, 1984, sent a check to the IRS in the amount of $137,763.31. That check represented the unpaid balance due on its assessed tax liability plus applicable penalties and interest (Pet. 5-6).

After petitioner filed a notice of appeal, the government moved to dismiss the appeal as moot or in the alternative for summary affirmance. The court of appeals by unpublished order granted the motion to dismiss (Pet. App. 1a). It stated that petitioner's "satisfaction of the assessed tax

deficiency constituted payment of the taxes" and that petitioner's "appeal from the dismissal of its action for an injunction against the collection of [the] taxes * * * is therefore moot" (*ibid.*).

ARGUMENT

1. The decision below is correct. Under Article III of the Constitution, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions." *Mills* v. *Green,* 159 U.S. 651, 653 (1895). The "actual controversy" that is required must be in existence at all stages of review, and not merely at the time the complaint is filed. *Preiser* v. *Newkirk,* 422 U.S. 395, 401 (1975); *Steffel* v. *Thompson,* 415 U.S. 452, 459 n.10 (1974). Therefore, a case that was "live" when the complaint was filed may become moot on appeal. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974).

The court of appeals properly dismissed petitioner's appeal as moot. Petitioner sought an injunction against the collection of federal taxes. See I.R.C. § 7421(a) (cross-referring to I.R.C. § 6213(a) (last sentence)). When that injunction was denied, petitioner chose to pay the entire amount of the assessed tax without seeking a stay pending appeal. Fed. R. Civ. P. 62; Fed. R. App. P. 8(a). Because the taxes had been paid in full, the court of appeals was without jurisdiction to order that their collection be enjoined. There was thus no longer any case or controversy between the parties. *Little* v. *Bowers,* 134 U.S. 547 (1890); *Singer Manufacturing Co.* v. *Wright,* 141 U.S. 696 (1891); *Koger* v. *United States,* 755 F.2d 1094, 1096 (4th Cir. 1985); *Hall* v. *United States,* 749 F.2d 373 (7th Cir. 1984).

2. Petitioner asserts (Pet 11) that its appeal was not moot because its $137,763.31 remittance made on May 30, 1984, was not a "payment" of tax but was a mere "deposit"

in the nature of a cash bond. This assertion is meritless. The courts, of course, have distinguished between payments made to satisfy an assessed tax liability and advance payments in the nature of a cash bond made to avoid the accumulation of interest. The IRS will treat as a cash bond, and place in a "suspense account," any remittance accompanied by a clear statement that it is intended solely to avoid the accumulation of interest and penalties with respect to an anticipated assessment. See *Rosenman* v. *United States,* 323 U.S. 658 (1945); *Fortugno* v. *Commissioner,* 353 F.2d 429, 435 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966). The IRS will return such a deposit at the taxpayer's request at any time before an assessment of the subject taxes is made. However, upon assessment, the deposit is treated as a payment and applied against the assessed tax liability. See Rev. Proc. 82-51, 1982-2 C.B. 839, 840 (where a taxpayer upon completion of an audit "execute[s] a waiver of restrictions on assessment and collection of the deficiency or otherwise agrees to the full amount of the deficiency, an assessment will be made and any deposit [will be] applied against the assessed liability. In such a case, no notice of deficiency will be mailed.").

Petitioner's attempt (Pet. 11) to characterize its remittance as a mere "deposit in the nature of a cash bond" has no basis in the record. Petitioner signed IRS Form 870-C on March 8, 1978, consenting to the assessment and collection of its PHC taxes and further waiving its right to contest those deficiencies in the Tax Court. That consent became effective on July 13, 1978, when petitioner failed to file IRS Form 969 within the 120-day period specified by the statute. See I.R.C. § 547(e). The IRS subsequently assessed the deficiency in accordance with the conditions to which petitioner had previously agreed. Since petitioner's tax liability had already been assessed at the time it made its $137,633

remittance, that remittance necessarily constituted a payment of taxes and could not be a "cash bond." Rev. Proc. 82-51, *supra*, at 840.

3. Contrary to petitioner's assertion (Pet. 10-11), the decision below does not conflict with *Rosenman* v. *United States*, 323 U.S. 658 (1945), which the court of appeals (Pet. App. 1a) correctly cited in support of its holding. In *Rosenman*, an estate had delivered a check to the IRS in 1934 on account of estate taxes expected to be assessed; the check was delivered the day before the estate tax was due, "solely for the purpose of avoiding penalties and interest" (323 U.S. at 659-660). The IRS deposited the check to the estate's credit in a "suspense account [which] concern[ed] moneys received in connection with federal estate taxes [as to which] no assessment [was] outstanding at the time" (*id.* at 660). The IRS ultimately assessed the estate tax in April 1938, some three and a half years after receiving the check (*id.* at 661).

This Court held that the estate's delivery of the check to the IRS in 1934 did not constitute "payment of [the estate] tax" (323 U.S. at 659). Rather, the estate tax could not be "paid" prior to "the assessment of a deficiency by the Commissioner in April 1938," whereupon "payment was then made by the application of the balance credited to the [estate] in the suspense account" against the tax so assessed (*id.* at 661-662). The 1934 check, the Court said, was held by the IRS "but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due" (*id.* at 662).

The decision below is completely consistent with *Rosenman*. There, the remittance deemed a "cash bond" was made three and a half years before the assessment; the Court concluded that the remittance became a "payment" upon the assessment, when the deposit was applied against the taxes so assessed. Here, as petitioner concedes (Pet. 5),

the remittance was made almost five years *after* the assessment, and it thus became a "payment" immediately. Although petitioner's remittance was accompanied by a letter styling the payment "a deposit in the nature of a cash bond" (Pet. 6), the label petitioner attached is irrelevant in view of the fact that the assessment had long ago been made. Whatever petitioner called the remittance, it became a "payment" when it was applied against the existing assessed liability. See *Rosenman,* 323 U.S. at 661; Rev. Proc. 82-51, *supra,* at 840. The law is clear that remittances made in such circumstances are to be treated as tax payments and not as mere deposits. See, *e.g., Charles Leich & Co.* v. *United States,* 329 F.2d 649 (Ct. Cl. 1964); *Republic Petroleum Corp.* v. *United States,* 613 F.2d 518, 526 (5th Cir. 1980).[4]

Petitioner's assertion that it tendered the remittance only "to prevent [the IRS] from seizing [its] assets" (Pet. 6) is also irrelevant in determining whether the remittance was a payment or a cash bond. As we have shown above, the remittance was necessarily a "payment" because, given the existence of the outstanding assessment, the remittance discharged petitioner's tax liability. If petitioner wished to prevent collection of the tax pending appeal of the district court's denial of a preliminary injunction, petitioner's proper remedy was to request a stay pending appeal. Fed.

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[4]Petitioner seems to acknowledge that *Rosenman* stands for the principle "that a remittance made prior to assessment d[oes] not constitute payment of the tax" (Pet. 9), but seeks to bring itself within that principle by asserting that "there has been no *valid* assessment of the tax" here (*id.* at 9, 11 (emphasis added)). But that assertion begs the question, for it is the validity of the assessment that petitioner seeks to challenge on the merits. The taxpayer in *Rosenman* similarly complained on the merits of an "alleged illegal assessment" (323 U.S. at 661), but that allegation did not stop the assessment from converting its deposit into a "payment" for purposes of ascertaining jurisdiction. It is the *fact,* not the *validity,* of the assessment that determines the status of petitioner's remittance as a "payment" rather than a "cash bond."

R. App. P. 8(a). See *Little* v. *Bowers,* 134 U.S. at 552-553; *Koger* v. *United States,* 755 F.2d at 1098. Petitioner failed to do that, and instead elected to discharge its existing tax liability. The taxes having thus been collected in full, petitioner's action to enjoin their collection became moot. It is well settled that payment of a tax followed by a suit for refund constitutes an adequate remedy at law. *Bob Jones University* v. *Simon,* 416 U.S. 725, 742 (1974); *South Carolina* v. *Regan,* 465 U.S. 367, 374-376 (1984). Petitioner's proper avenue of redress at this point is accordingly to file a claim for refund of the taxes it has paid, and, if a refund is refused, to raise its allegations concerning the supposed invalidity of the assessment in a suit for refund brought in a district court or in the Claims Court. See 28 U.S.C. 1346(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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[5]Because of its ruling on the mootness issue, the court of appeals had no occasion to address the merits of petitioner's claim that it was entitled to injunctive relief under Section 6213(a) because of the supposed invalidity of the assessment. As petitioner seems to recognize (Pet. 16), the injunction issue is not before this Court. We accordingly have not responded to petitioner's contentions on the merits, but will do so if the Court requests.

Supreme Court, U.S.
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(3)

No. 85-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC.,

Petitioner,

—v.—

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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ARGUMENT

The Government ought not be allowed to moot the Taxpayer's injunction argument by seizing its assets and applying them to an invalid assessment particularly where this Court has implicitly held such a seizure does not moot such arguments. *Laing v. United States*, 423 U.S. 161 (1976). Nor should the Government be successful in arguing that *Rosenman v. United States*, 323 U.S. 658 (1945), supports its contention that a cash bond applied to an invalid assessment is a payment of such an

* The Rule 28.1 listing was complied with by letter to the Clerk of the Court dated October 10, 1985. That letter is currently accurate.

assessment. If the Government is successful in such arguments it will have the power to deny taxpayers the right Congress gave them to resolve such disputes through injunction actions. The Taxpayer asks this Court to state explicitly that which this Court has implicitly stated.

1. The Government argues that any assessment, even an invalid assessment (Br. 8, n. 4)[1], that is followed by the Government's seizing assets of the Taxpayer[2] can only be remedied by filing a claim for refund and then, if necessary, filing a suit for refund (Br. 8-9). Such argument, however, is contrary to the implicit holding and the result in *Laing v. United States*, *supra*, (Pet. 14).[3]

The chronology of the relevant facts in *Laing v. United States*, *supra*, is similar to that in this case. The IRS made an assessment against Mr. Laing, he refused to pay the tax, the IRS seized currency that had been found in the automobile in which Mr. Laing and two companions were traveling, and the IRS applied a portion of the seized funds to the tax assessed

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1 Br. refers to the Brief For the Respondent In Opposition.

2 The Government incorrectly attempts to establish that the Taxpayer had a choice of remitting the check of $137,763.31 or seeking a stay pending appeal (Br. 4, 8-9). The letter sent with the check in issue (Pet. 5-6) establishes the only choice the taxpayer had was to send the check or have its other assets seized. The district court refused to grant even a temporary restraining order while the injunction action was being considered (CR 7, p. 12). The district court stated that collection action was being withheld at the "sufferance" of the Government (CR 7, p. 14). The Summary Judgment hearing was on May 21, 1984, a Friday (CR 24). On Monday, May 24, 1984, the threat of seizure of assets was made by the IRS (Pet. 5-6). If the IRS did not then obtain a verbal commitment that a check would be mailed, it stated it would seize the Taxpayer's bank accounts. The first business day after Summary Judgment was granted to the Government, the threat of immediate seizure was made, which prevented the Taxpayer from taking any step but to send the check of $137,763.31. There was no time to make any motion for a stay.

3 Such argument also proves the validity of the Taxpayer's argument as to what the Government can do, at least in the Ninth Circuit, if the order of the court of appeals is allowed to stand (Pet. 15).

against Mr. Laing. *Laing v. United States*, *supra*, at 165-166. This Court did not find the amounts seized and applied against Mr. Laing's assessment to be a "payment", thus causing his injunction action to be moot. There is no mention of an argument by the Government that Mr. Laing should have obtained a stay which the Government argues in this case. The Government's argument in this case (Br. 8) ignores the implicit holding by this Court in *Laing v. United States*, *supra*. (Also see Pet. 13-14). Here the Government argues that even if the assessment is illegal, once the Taxpayer's assets have been seized by the IRS and applied to such assessment, the injunction action becomes moot (Br. 8).

The Government has not attempted to reconcile its position concerning invalid assessments with *Laing v. United States*, *supra*, nor with the absolute prohibition contained in Section 6213(a), I.R.C. of 1954, against such assessments.

2. Notwithstanding its argument that the validity of an assessment is not relevant, the Government does attempt to have its assessment in this case recognized as being valid. The Government has introduced some arguments relative to a Form 870-C, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" (Br. 2-3).

Waiver is an affirmative defense (Fed.R.Civ.P. 8(c)). Therefore, the Government was required to raise the issue by answer or motion (Fed.R.Civ.P. 12(b)), but it never did.[4] Indeed, the Government expressly stated in oral argument in the district court that the waiver issue was not relevant (CR 28, pp. 14-15) and the Government conceded that it did not mail a notice of deficiency (CR 28, p. 15).

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4 See also, *Dierks v. United States*, 215 F.Supp. 338 (S.D.N.Y. 1963), where an assessment was based on a stipulation in a Tax Court case but the taxpayer contested the validity of the stipulation and so the court held that the Government must show the validity of the stipulation.

Even when the Government filed its Notice and Motion For Summary Judgment (CR 13), it did not raise the issue of waiver. The motion for summary judgment is based solely on the claim of the Government that the Taxpayer is not entitled to injunctive relief because it cannot establish irreparable injury and lack of an adequate legal remedy. The motion is devoid of any reference to any alleged waiver by the Taxpayer of the restrictions under Section 6213(a), I.R.C. of 1954, on assessment and collection of tax (CR 13, pp. 1-2). The Taxpayer never had the opportunity to litigate the waiver issue nor had there ever been a need to do so. The Taxpayer has always denied that the Form 870-C ever became effective.

Since there is no basis in the record to find that the assessment was based on an effective Form 870-C, and since the Government has conceded that no notice of a deficiency has been mailed to the Taxpayer, there is no basis to find that the assessment is valid.

3. The Government contends that the decision below does not conflict with *Rosenman v. United States*, 323 U.S. 658 (1945), because the remittance was made almost five years after the assessment and it thus became a payment immediately; that the remittance was a payment even if the assessment was illegal and void; and that it is the *fact*, not the *validity*, of the assessment that determines the status of the Taxpayer's remittance as a "payment" rather than a "cash bond" (Br., pp. 7-8). The Government cites no authority which supports this novel proposition of law and the Taxpayer has found none.

The Government asserts that the taxpayers in *Rosenman v. United States*, *supra*, similarly complained on the merits of an "alleged illegal assessment", but that allegation did not stop the assessment from converting the deposit into a "payment" (Br., p. 8, n. 4).

The facts in *Rosenman v. United States*, *supra*, establish the validity of the assessments therein. On February 25, 1935, the taxpayers filed their estate tax return showing tax due of

$80,224.24, which amount was assessed under their return. Upon completion of the audit of the return, the IRS determined that the total net tax due was $128,759.08 and issued a notice of deficiency. No appeal to the Board of Tax Appeals (the former name of the Tax Court) having been taken, in April 1938, a deficiency of $48,534.84 was assessed. The IRS thereupon applied the balance of $39,775.76 standing to the credit of the taxpayers in the suspense account in partial satisfaction of the deficiency and on April 22, 1938, the taxpayers paid the IRS the additional amount of $10,497.34, which covered the remainder of the deficiency plus interest.

Neither party contended that the assessments were illegal and void. The assessment of the tax shown due on the return was made under the authority of the predecessor of Section 6201(a)(1), I.R.C. of 1954. The assessment of the deficiency was made pursuant to the deficiency procedures authorized by the predecessor of Section 6213(a), I.R.C. of 1954, after a notice of deficiency had been issued and the taxpayers had failed to file a petition in the Board of Tax Appeals contesting the deficiency. Far from complaining that the assessment had converted their deposit into a payment, the taxpayers relied on the assessment in contending that the balance of $39,775.76 standing to the credit of the taxpayers, part of a remittance of $120,000 which they had made in 1934, did not become a payment of tax prior to the assessment of the deficiency. True, the taxpayers claimed that on the merits, the tax was erroneously assessed, that is, that the assessment was greater than their correct estate tax liability. But they did not contend, and the Court did not hold, that the assessment was illegal and void as having been made in contravention of the procedures in the controlling revenue laws for the making of assessments of estate tax.

Laing v. United States, *supra*, refutes the Government's contention that the remittance made under the circumstances of this case became a payment of the tax by virtue of the illegal and void assessment herein (Pet. 14).

Rosenman v. United States, *supra*, stands for the proposition that a remittance which does not admit, but specifically denies, liability for, and is not intended to satisfy, an asserted deficiency in income, estate or gift tax, does not become a payment prior to a legal and valid assessment of the tax under the procedures in the controlling revenue laws for the making of assessments of such tax. In this case, there was neither an acquiescence in the proposed deficiency nor a legal and valid assessment of it, since no notice of deficiency was issued. Therefore, the court of appeals' holding, that the remittance constitutes payment of the tax, is in conflict with *Rosenman v. United States*, *supra*. Under that decision and the facts in this case, the remittance made on May 30, 1984, was not payment of the void and illegal assessment, but was a mere deposit in the nature of a cash bond.

The Government's argument that a refund suit is an adequate remedy begs the question. Congress has already given this Taxpayer, and all other taxpayers similarly situated, a different remedy. Under Section 6213(a), I.R.C. of 1954, Congress gave all taxpayers the right to an injunction in cases such as this. The Government's argument, if successful, will deny this Taxpayer, and all taxpayers similarly situated, that right to an injunction.

From a review of the Taxpayer's petition for a writ of certiorari and the Government's brief, there is no basis to find that the assessment is valid and there is no basis to find that the check of $137,763.31 was a "payment" of the assessment. Accordingly, by granting certiorari in this case and reversing the court of appeals on the mootness issue, the Taxpayer will be enabled to maintain before the court of appeals that *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), are contrary to a prior decision of this Court, *Laing v. United States*, *supra*, and misapply a prior decision of this Court, *Weinberger v.*

Romero-Barcelo, 456 U.S. 305 (1982), concerning the correct rule of law to follow in applying equitable principles in Section 6213(a), I.R.C. of 1954, injunction cases. Should the court of appeals not overrule its own two decisions, the Taxpayer could then seek review by this Court on the injunction issue.

CONCLUSION

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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